

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TERESO T. ROAN)	
Claimant)	
V.)	
)	
WESTERN INDUSTRIES PLASTICS, INC.)	
Respondent)	Docket No. 1,053,907
)	
AND)	
)	
SPARTA INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appealed the January 27, 2016, Award entered by Administrative Law Judge (ALJ) Gary K. Jones. The Board heard oral argument on May 20, 2016, in Wichita, Kansas.

APPEARANCES

Claimant filed no brief with the Board and did not appear. P. Kelly Donley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In this claim for a November 15, 2010, accidental injury, ALJ Jones found claimant sustained an impairment to his left shoulder, but not to his neck. The ALJ awarded claimant permanent partial disability benefits based upon a 12 percent functional impairment to the left upper extremity at the level of the shoulder and future medical benefits. In explaining his decision, the ALJ stated:

An initial question in this case is how the accident occurred. The evidence is conflicting. The Court finds the Claimant was injured when the part fell and jerked

his left arm and shoulder. The evidence convinces the Court that the part did not strike the Claimant on the neck. The accident reports from the Respondent and the Claimant's own initial reports to Dr. Morris and Dr. Murati, the first doctors he saw after the accident [whose] records are in evidence, show this to be the case.

The question then becomes whether the evidence shows that the jerking motion of the falling part caused impairment to the neck as well as the left upper extremity. Again, the evidence is conflicting. Considerably more evidence is before the Court now than was presented at the earlier preliminary hearings. The Court concludes that the Claimant sustained impairment to his left shoulder but not to his neck. Dr. Murati initially opined that the Claimant sustained only left upper extremity impairment, but later added cervical impairment. Dr. Murati's explanation that he was only asked to rate the upper extremity lacks credibility.¹

Claimant's former attorney, James B. Zongker, filed claimant's application for review on January 29, 2016, indicating nature and extent of disability was at issue. On February 16, 2016, an Order allowing Mr. Zongker to withdraw as claimant's attorney was entered. A briefing schedule and notice of hearing were provided to Mr. Zongker prior to the February 16, 2016, Order allowing him to withdraw. The Board also emailed claimant's wife a hearing schedule on May 12 and 18, 2016, and unsuccessfully attempted to contact claimant by telephone on May 18 and 19, 2016. As noted above, claimant did not file a brief with the Board.

Respondent contends claimant did not sustain a permanent injury or impairment to his neck. Respondent maintains claimant sustained a 2 percent upper extremity functional impairment for a left shoulder injury. In the alternative, respondent submits claimant sustained a 12 percent left upper extremity functional impairment. Respondent contends claimant is not entitled to receive future medical benefits.

The issues are:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to future medical treatment?

FINDINGS OF FACT

Claimant does not speak English and required an interpreter when he testified. At the March 13, 2012, regular hearing, claimant described his November 15, 2010, accident as follows:

Q. And what part of your body got injured?

¹ ALJ Award at 9.

A. Left shoulder.

Q. And did you also injure your arm and going around to right below your neck?

A. That's right.

Q. Now then, how did you injure yourself, what were you doing?

A. I was trying to hold a part² coming out of the machine, something got stuck, I pulled and it got loose and fell on my arm pretty hard, it fell to the side. I felt a pop on my arm and I knew something was wrong.³

...

Q. Okay. And at the present time, where do you hurt?

A. Right now I feel -- it hurts and it feels like a pinch here in my shoulder. And under here, under my neck it hurts, at night three of my fingers get numb, I have to put a pillow here in order to support my arm.⁴

Claimant testified the numbness in his fingers began after surgery and his neck area symptoms began when he started post-surgery physical therapy.

At a January 14, 2014, preliminary hearing, claimant requested medical treatment for his neck with neurosurgeon Dr. Nazih Moufarrij. Claimant testified he injured his left shoulder and felt pain in his neck. He indicated that when he was treated for his left shoulder by Dr. Harry A. Morris, he advised the doctor he had neck pain. Eventually, Dr. Morris surgically repaired claimant's left shoulder. Claimant indicated that when he underwent physical therapy for his left shoulder, he advised personnel that he had neck issues. The ALJ found claimant failed to prove his neck injury was caused or contributed to by his accident and denied medical treatment.

Claimant requested medical treatment for his neck with Dr. Moufarrij at a December 11, 2014, preliminary hearing. Claimant described his accident as follows:

Q. And describe the accident. What happened?

A. Well, pardon me, we were working, lifting -- I pulled a piece. While I was pulling it, it came apart from the mold. It fell onto my arm and my shoulder, and I felt that --

² Several witnesses described this as a piece of plastic, a part or an object. For ease of reading, the term "part" is used.

³ R.H. Trans. (Mar.13, 2012) at 7-8.

⁴ *Id.* at 9.

Q. Did it also strike your neck?

A. It also did strike my neck.

Q. And did you immediately feel pain in your arm and shoulder?

A. From the moment that it fell upon me it started.

Q. Okay. And did you feel pain in your neck also?

A. I also did feel pain in the neck.⁵

At the April 2015 regular hearing, claimant indicated the part fell on his left shoulder and did not testify the part struck his neck. Claimant testified he had neck pain and reported the mechanism of his accident and all his symptoms to Drs. Morris, Pedro A. Murati and Peter V. Bieri.

At a post-regular hearing deposition, claimant testified he had no neck problems prior to his accident. He did not recall seeing neurosurgeon Dr. William Shapiro in 1995 and reporting cervical and mid-back symptoms. He recalled having low back symptoms at that time. Claimant did not recall Dr. Shapiro ordering a cervical and thoracic spine MRI for C7 through T12. Later, claimant indicated he saw Dr. Shapiro for mid and low back issues, but did not complain of neck pain.

Irene Roan, claimant's wife, testified she informed Dr. Morris that claimant had pain in his left shoulder radiating down and numbness to the arm and upper back. According to Mrs. Roan, she told physical therapy personnel what physical problems claimant was having, including left shoulder problems with numbness and tingling going down his arm. Mrs. Roan also indicated she informed Dr. Bieri that claimant was having numbness and tingling. Mrs. Roan reported claimant's neck and shoulder pain and numbness and tingling going down his arm to Dr. Moufarrij. She also testified she told Dr. Murati of claimant's shoulder, neck, upper back and arm symptoms.

Doug Wagner, respondent's human resources director, testified that Theresa McClelland, respondent's safety manager, investigated claimant's accident. Mr. Wagner indicated he has two clerks and both are translators. According to Mr. Wagner, the investigation revealed a part was stuck on an extractor and claimant forcibly removed it. When the part fell, claimant thought he was going to fall from a step and jerked away, injuring his left shoulder. Claimant did not report the part struck him and respondent's records do not indicate the part struck claimant.

⁵ P.H. Trans. (Dec. 11, 2014) at 10-11.

Before Ms. McClelland became the safety manager, she worked as a machine operator and assembly line manager. She interviewed claimant the afternoon of his accident. Ms. McClelland did not remember whether there was an interpreter present when she spoke with claimant. Naomi Espino testified she interpreted for Ms. McClelland when she interviewed claimant. Ms. McClelland indicated claimant complained of a left shoulder injury. Ms. McClelland testified:

He didn't pull the part from the machine. The part extractor attached to the top and it pulls mechanically the part toward the operator. The part extractor arms open and the operators use gravity and they guide the part to the table. When he felt the pop and pain to his shoulder was when, as he was trying to -- because it stuck to one side of the part extractor arm, he was pushing upward and pulling at it, it came loose and it was falling toward him so he used his body, his arm motions to push it toward the table and he started to lose his balance on a platform he was standing on and that's when he felt the pop to his left shoulder.⁶

Dr. Morris first saw claimant for his left shoulder injury on December 6, 2010. Claimant gave a history of pulling on a part that was stuck and when the part came loose, his left arm jerked suddenly. On January 13, 2011, Dr. Morris performed a left rotator cuff repair and subacromial decompression. Dr. Morris indicated claimant reached maximum medical improvement on July 29, 2011, and in accordance with the *Guides*,⁷ assigned claimant a 2 percent left shoulder functional impairment. The doctor saw claimant last on August 17, 2011. At that time, the doctor recommended anti-inflammatory medication and an anti-inflammatory gel.

Dr. Morris did not recall claimant making neck complaints. Had claimant made cervical spine complaints, Dr. Morris would have noted them. Dr. Morris indicated he would have been concerned with claimant's neck if he reported tingling in his arms. The doctor does not treat necks. According to Dr. Morris, he was authorized to treat the shoulder only, but he noted claimant had hand symptoms.

The ALJ ordered Dr. Bieri to evaluate and rate claimant and did not restrict the evaluation to claimant's left shoulder. Dr. Bieri evaluated claimant's left shoulder and cervical spine on April 9, 2012. His cervical spine examination revealed no visible or palpable muscle spasm at rest, no significant tenderness to palpation and active range of motion was full and unrestricted. There was tenderness to palpation at the AC joint radiating into the biceps and deltoid. Strength was decreased 25 percent to resisted flexion, abduction and external rotation. Deep tendon reflexes were normal and distal range of motion was full and unrestricted. Dr. Bieri opined claimant had a 12 percent left

⁶ McClelland Depo. at 23-24.

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

upper extremity functional impairment. The doctor noted claimant had symptomatology consistent with entrapment neuropathy of the left upper extremity and had not undergone diagnostic or treatment interventions.

Dr. Bieri indicated claimant was under no active treatment. The doctor noted claimant was taking Naprosyn and using Voltaren gel as needed, but no other future specific medical treatment was anticipated.

In a September 17, 2013, letter to claimant's attorney, Dr. Bieri stated his original conclusion was that claimant had no significant primary cervical injury. Dr. Bieri noted an August 2013 MRI report revealed disc bulges at three levels, but no significant cord compression or nerve root compression. Dr. Bieri stated there were no significant objective findings to support additional impairment.

Dr. Moufarrij saw claimant for neck pain on October 3, 2013, upon a referral from Hunter Health Clinic. Claimant was post left shoulder surgery and reported his left arm was weak, pinching in his left shoulder and neck pain radiating down his left shoulder to his arm and hand. A cervical spine MRI report reviewed by Dr. Moufarrij showed small disc bulges at C3-4, C4-5 and C6-7, with the C3-4 disc contacting the anterior cord, but no evidence of significant cord compression. There was no evidence of nerve root compression, no evidence of acute or old fractures, no significant subluxation, no evidence of spinal stenosis and the cervical cord was normal. The doctor recommended physical therapy and epidural injections.

When re-interviewed by Dr. Moufarrij on July 24, 2014, claimant reported being injured when a 60-pound part fell on his left shoulder and the left side of his neck and having immediate pain and numbness in the neck and left arm. Dr. Moufarrij testified that if seven assumptions were correct, then within a reasonable degree of medical probability, claimant's neck condition was caused or aggravated by his accident. Those seven assumptions were that claimant: (1) had no prior neck problems, (2) never saw a physician, (3) never saw a chiropractor, (4) never had an x-ray, (5) never had an MRI, (6) never had a neck CT and (7) was telling the truth when he said he had neck pain after a 60-pound object fell on his left shoulder and the left side of his neck.

Dr. Moufarrij last saw claimant on April 14, 2015. At that time, claimant had received no medical treatment for his neck. The doctor reviewed a recent cervical spine MRI, which he agreed showed three mild to moderate cervical disc bulges. The doctor diagnosed claimant with three mild to moderate disc bulges at C3-4, C4-5 and C6-7 and recommended physical therapy and epidural injections.

At the request of his attorney, claimant was evaluated by Dr. Murati on November 7, 2011. Claimant presented with five complaints, all related to his left shoulder or arm. One complaint was tenseness in the left shoulder and upper back. Dr. Murati noted:

He states that he was attempting to remove a part from the extractor arm when it got stuck. Tereso reports that [the] parts had gotten stuck before so he pulled on the part to free it from the extractor. When he pulled the piece he states that it came down with great force and he felt pain in his left shoulder. The claimant indicates the part he was trying to retrieve was approximately 35-40 pounds.⁸

Dr. Murati's impressions were status post left shoulder diagnostic arthroscopy, subacromial decompression and rotator cuff repair, as well as left carpal tunnel syndrome referring pain to the shoulder. Dr. Murati opined claimant sustained a 10 percent functional impairment for left subacromial decompression, a 9 percent functional impairment for left shoulder loss of range of motion and a 10 percent functional impairment for left carpal tunnel syndrome, which combine for a 26 percent left upper extremity impairment. The doctor acknowledged he was not asked to provide an impairment rating for left carpal tunnel syndrome.

The report of Dr. Murati did not include a diagnosis or impairment rating relating to claimant's cervical spine. When questioned about this, Dr. Murati testified claimant had signs of radiculopathy, which included missing reflexes on both sides, a loss of sensation along the C5 dermatome and weakness in the elbow flexors. Dr. Murati indicated he did not comment on these findings in his report because he was asked to give only a left shoulder impairment.

According to Dr. Murati, claimant falls in DRE Cervicothoracic Category III of the *Guides* for a 15 percent whole body functional impairment. When combined with claimant's 26 percent left upper extremity impairment, claimant had a 29 percent whole body functional impairment. The doctor acknowledged the impairment rating he gave for claimant's neck was an additional impairment he had not previously provided. Dr. Murati provided the additional impairment rating after being shown additional medical records of Drs. Bieri and Moufarrij during a pre-deposition conference with claimant's counsel lasting approximately five minutes. Dr. Murati conceded he was provided a different history of how the accident occurred by claimant than claimant provided to Dr. Moufarrij.

Dr. Murati disagreed with Dr. Bieri's statement that claimant had no nerve root compression at any level because he found loss of reflexes, sensation and muscle strength related to the neck. Dr. Murati indicated his findings are consistent with those of Dr. Moufarrij, who was concerned with radiculopathy and noted there were mild bulges at C3 and C4. Dr. Murati testified a disc bulge could produce radiculopathy.

The parties stipulated into the record notes and reports of several physicians from 1994 through 1996. Those records indicate claimant complained of neck and low back pain to Dr. Richard H. Egelhof in 1994. In 1995, Dr. Jeanette C. Salone diagnosed

⁸ Murati Depo., Ex. 2 at 1.

claimant with a lumbar strain, lumbar disc bulges and probable referred pain to the cervical and thoracic areas. Dr. William M. Shapiro, in 1995, noted tenderness at C7 and T12. In 1996, Dr. Murati diagnosed claimant with spinal stenosis and disc bulges at L3-4 and L4-5 and myelopathy secondary to spinal stenosis.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁹ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”¹⁰

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.¹¹

Claimant provided three versions of how his accident occurred. In one version, he merely yanked on a part and, while doing so, injured his left shoulder. In that version, the part did not strike claimant. Claimant also testified the part struck his left arm and/or shoulder only. In a third description of the accident, claimant stated the part struck his neck and he sustained an immediate injury. As noted by the ALJ, the evidence is conflicting.

The medical evidence is also conflicting. Dr. Morris, who treated claimant for his left shoulder, indicated claimant reported no neck injury. Dr. Moufarrij diagnosed claimant with cervical disc bulges. The doctor concluded claimant sustained a work-related neck injury, but based that opinion, in large part, on claimant’s version of the accident that he was struck on the neck by the falling part. Dr. Moufarrij noted that if seven assumptions were correct, claimant’s neck condition was caused or aggravated by his work accident. One of those assumptions was that claimant was telling the truth that a 60-pound part fell on his neck. Another assumption was that claimant had no prior neck problems. A third assumption concerned the lack of a prior neck MRI. The record indicates that in 1994 and 1995, claimant complained of neck pain to Drs. Egelhof, Salone and Shapiro.

⁹ K.S.A. 2010 Supp. 44-501(a).

¹⁰ K.S.A. 2010 Supp. 44-508(g).

¹¹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Dr. Murati's opinions are simply not credible. The doctor, in addition to finding claimant had a left shoulder impairment, determined claimant had a functional impairment for left carpal tunnel syndrome. However, claimant never alleged a forearm or wrist injury. Dr. Murati's report mentioned no neck injury or impairment. During a conference with claimant's counsel, Dr. Murati was shown the reports of Drs. Bieri and Moufarrij, wherein they noted claimant had a neck condition. Dr. Murati then testified claimant had a neck impairment, but indicated he did not mention the neck injury in his report because he was not asked to evaluate claimant's neck. Providing a carpal tunnel diagnosis and rating when not asked to do so, but not doing the same for claimant's cervical spine is, at best, inconsistent. At worst, the foregoing represents the doctor being an overzealous advocate for claimant and magnifying claimant's questionable subjective complaints into a ratable medical condition.

The Board finds most credible the opinion of Dr. Bieri that claimant sustained no permanent neck impairment. Dr. Bieri evaluated claimant's cervical spine by order of the ALJ. The doctor initially concluded claimant suffered no significant neck injury. In a September 2013 letter to claimant's attorney, Dr. Bieri diagnosed bulging cervical discs, but opined claimant had no permanent functional impairment.

The Award did not make a finding that claimant's accident did or did not cause a neck injury, but concluded claimant suffered no functional impairment to his neck. The Board concurs claimant sustained no permanent neck impairment and the issue of whether he did or did not sustain a neck injury is moot.

The Board finds claimant sustained a 12 percent left upper extremity impairment for reasons set forth in the Award. The Board also finds claimant is entitled to apply for future medical treatment. Dr. Morris recommended an anti-inflammatory medication and gel when he last saw claimant. Dr. Bieri noted claimant was using said medications as needed. The Board also notes this case pre-dates the 2011 amendments to the Kansas Workers Compensation Act. Pursuant to K.S.A. 2010 Supp. 44-510h(a), the ALJ correctly found claimant's right to future medical treatment should remain open subject to proper application.

CONCLUSION

1. Claimant proved he sustained a 12 percent left upper extremity functional impairment at the level of the shoulder.
2. Claimant is entitled to apply for future medical treatment.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹² Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board affirms the January 27, 2016, Award entered by ALJ Jones.

IT IS SO ORDERED.

Dated this ____ day of June, 2016.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

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Honorable Gary K. Jones, Administrative Law Judge

¹² K.S.A. 2015 Supp. 44-555c(j).